EO: 200
BYE: 201533

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

003
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1826

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150513). Claimant filed a timely request for hearing. On November 6, 2014, ALJ Dorr conducted a hearing at which the employer did not appear, and on November 7, 2014 issued Hearing Decision 14-UI-28414, affirming the Department's decision. On November 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Because neither party submitted objections to the admission of Exhibit 1 within five days of the mailing of Hearing Decision 14-UI-28414, Exhibit 1 will remain in the hearing record.

Claimant submitted a written argument in which, although she did not object to the ALJ's admission of Exhibit 1, she attempted to introduce new facts. However, claimant did not explain why she failed to offer this new information during the hearing, or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). Because claimant did not comply with the regulation, EAB considered only evidence received into the record when reaching this decision.

FINDINGS OF FACT: (1) Oregon Youth Authority employed claimant as a group life coordinator from January 3, 1994 until August 15, 2014. Claimant supervised incarcerated youth in a secured correctional facility. The parking lot of the facility was part of the secured area.

(2) The employer expected claimant to adhere to all federal and state laws while on and off-duty. The employer also expected claimant to refrain from behaviors, while on-duty and off-duty, that undermined public confidence in the employer's mission or demonstrated an inability to act as a positive role model for the incarcerated youth she supervised. The employer further expected claimant to refrain from distributing, dispensing or possessing controlled substances in the workplace. Claimant was aware of the employer's expectations as a matter of common sense.

(3) Claimant was very good friends with Tina Egler (Egler). Egler worked for the employer as a coordinator on a different unit from that on which claimant worked. Both claimant and Egler were good friends with a woman known to them as "Trixie" or "Trix." Trixie was not employed by the employer.

(4) Between March 20, 2012 and May 11, 2014, while at work, claimant and Egler exchanged forty emails in which they routinely discussed giving or exchanging prescription drugs, including Percocet, Ritalin and Flexeril, among themselves and Trixie. Exhibit 1 at 1-15. The pair sometimes used the terms "pears" or "percs" to refer to Percocet, and "flexies" to refer to Flexeril. Exhibit 1 at 5, 6, 7, 10. They sometimes used the terms "pills," "vitamins," "goodies" "groceries" or "food" to refer collectively to the drugs that they were exchanging. Exhibit 1 at 8, 10, 11, 12. They used the term "apples" to refer to a prescription medicine that was apparently a stimulant, by the description that it increased their energy levels and wakefulness and the fact that claimant needed to obtain it from a pharmacy. Exhibit 1 at 5, 6, 12, 13.

(5) In email exchanges occurring on March 19, 2012, May 3, 2012, May 12, 2012, May 16, 2012, February 20, 2013, June 6, 2013, August 11, 2013, December 11, 2013, claimant and Egler made arrangements to meet with each other at work, on the floor, in the facility's clinic or when on break, to deliver prescription medications to each other. Exhibit 1 at 5, 6, 8, 10, 11, 12. In emails exchanged on September 27, 2012, May 8, 2013, August 29, 2013, November 7, 2013, claimant agreed to deliver "goodies" or "apples" to Egler's vehicle in the workplace parking lot, and told Egler, as part of a discussion on Percocet and Ritalin, that "something wi[ll] be in yr truck before you leave today." Exhibit 1 at 6, 12, 13, 14. In an April 25, 2013, email, claimant asked Egler to deliver some pills to her car if Egler was able to persuade a physician to give her a prescription. Exhibit 1 at 12.

(6) The emails exchanged between claimant and Egler on September 20, 2012, March 23, 2013, March 25, 2013, May 8, 2013, June 6, 2014, July 10, 2013, July 11, 2013, August 11, 2013, December 11, 2013, March 20, 2014 and April 15, 2014 they discussed supplying each other with prescription medications, the number of pills that claimant wanted for herself or was willing to supply to Egler and how many pills each owed the other or Trixie. Exhibit 1 at 5, 6, 7, 8, 9, 10. In emails exchanged between claimant and Egler on January 23, 2013, April 15, 2014 and May 11, 2014, they discussed monetary payments for pills that each owed the other in place of payments in kind, and payments each owed to third parties for the purchase of pills. Exhibit 1 at 10, 14, 15.

(7) On May 21, 2014, while investigating another matter, the employer discovered the emails exchanged between claimant and Egler. On June 10, 2014, the employer placed claimant on duty at home until it could investigate the emails. On June 17, 2014, the employer interviewed claimant about the emails. Claimant said that "pears" was a slang reference to Percocet, but denied that she had ever exchanged it or any other controlled substance with Egler in the workplace. Claimant stated that the emails were a "running joke" between herself and Egler. Exhibit 1 at 15.

(8) On August 15, 2014, the employer discharged claimant for exchanging or transferring prescription drugs in the workplace in violation of state law, its principles of conduct and professional standards and its drug-free workplace policy.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Percocet (oxycodone and acetaminophen) and Ritalin (methylphenidate) are Schedule II controlled substances under the federal Controlled Substances Act. 21 USC §812(b)(2); 21 CFR §1308.12(b)(1)(xiii), (d)(4). Schedule II substances have a "high potential for abuse." 21 USC §812(b)(3)(A). ORS 475.185(1), the Oregon Controlled Substances Act, states that Schedule II controlled substances may only be dispensed with a valid prescription from a medical practitioner. ORS 475.752(1)(c) states that it is unlawful and a Class B Felony, for a person to deliver any Schedule II controlled substances unless that person is authorized to do so under the provisions of the Controlled Substances Act. ORS 475.005(8) defines "deliver" to mean the actual, constructive or attempted transfer, other than by administering or dispensing, from one person to another, of a controlled substances, whether or not there is any agency relationship. ORS 475.752(3)(b) states that it is unlawful and a Class C Felony for a person to knowingly and intentionally possess a controlled substances unless that substance was obtained pursuant to a valid prescription or order of a practitioner in the course of professional practice. Further, ORS 689.537(6) states that no person may sell, give away, barter, dispense, buy, receive or possess any prescription drug except as authorized by law.

Claimant's hearing testimony was not particularly forthcoming. For the first approximately one-third of the hearing, until the ALJ specifically asked her about whether the employer had discharged her, in part, for allegedly transferring or trading prescription medications to Egler, claimant contended that was discharged for the volume of personal emails she had exchanged with Egler. Audio at ~12:12. When the ALJ's questions became increasingly pointed, claimant admitted she had exchanged Percocet pills with Egler, who also had a prescription for Percocet, "a couple of times" when one or other ran out of that she had been prescribed, but never in the workplace. Audio at ~13:30, ~13:43. Claimant never contended that the emails in Exhibit 1 did not represent accurately what she and Egler had stated to each other, only that they somehow created a false impression. Written Argument at 1. It is difficult to think of a scenario where the plain language in the excerpted emails did not mean what it appears to mean. Rather than rare events, the emails show that claimant and Egler routinely exchanged significant amounts of prescriptions pills with each other between 2012 and 2014. Even if the other one had a similar prescription for Percocet or any other controlled substances, the exchange of the medicines violated the language of ORS 475.752(1)(c) and ORS 475.752(3)(b), since the exchanged pills were not intended for the other and the giving of the pills constituted "delivering" them within the meaning of ORS 475.005(8). Even if, as claimant contended, she and Egler never "sold" Percocet to each other, that is not a defense to the illegality of their behaviors, since the exchange of consideration is not required to violate ORS 475.752. Nor is it a defense to the illegality of claimant's conduct under ORS 689.537(6), which specifically includes as violations the "giving away" or "bartering" or "possessing" or "receiving" prescription drugs other than pursuant to a valid prescription. Because claimant knowingly and intentionally exchanged prescription drugs with Egler, even if she did not know that such behavior was illegal, she willfully violated Oregon law.

The many arrangements that claimant and Egler made to exchange controlled substances in the correctional facility show more likely than not, that claimant either came to possess controlled substances in the workplace that had not been prescribed for her or dispensed controlled substances in the workplace to persons other than authorized users under her prescription. Claimant also exchanged controlled substance with Egler in the secured parking lot of the facility using their vehicles as the transfer points. Although claimant did not contend that she had received an exemption from the scope of the employer's drug-free workplace policy for her prescriptions of controlled substances, even if she had, the exchange of those prescriptions with Egler still violated the employer's drug-free workplace policy.

Claimant did not contend that she was unaware that the employer required her to obey all laws while on-duty or off-duty and did not contend that she was unaware that the employer expected her to behave in a manner that did not undermine public confidence in the employer or in her ability to function as a positive role model for the incarcerated youth that she supervised. Claimant also did not contend that she was unaware that the employer's drug-free workplace policy prohibited her from freely exchanging her prescription medicines with Egler in the workplace. Claimant knew, if only as a matter of common sense, that public perceptions of the employer and the perceptions of the incarcerated youth would be fundamentally and negatively impacted if they became aware of claimant's and Egler's practices in exchanging controlled substances in the workplace and when on-duty. By knowingly and intentionally engaging in acts of exchanging controlled substances in the workplace that were not authorized under the prescriptions for them, claimant willfully violated the employer's standards in all of the previously mentioned particulars.

Claimant's behavior in exchanging controlled substances with Egler in the workplace was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single of infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-003891)(d)(A). It also means that claimant's behavior was not illegal or tantamount to unlawful conduct and did not cause an irreparable breach of trust in the employment behavior. OAR 471-030-0038(1)(d)(D). Here, claimant's willful behavior was repeated many, many times between 2012 and 2014. Because claimant's behavior was not isolated it is not excusable.

Nor was claimant's behavior in willfully exchanging controlled substances with Egler in the workplace excused as a good faith error under OAR 471-030-0038(1)(b). Given the regularity with which claimant's behavior occurred over a more than two year period, it is implausible that she sincerely believed that the employer would condone that behavior.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-28414 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: <u>January 27, 2015</u>

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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